

Institutional Transplantation and Reconfiguration of Incentive-Structures

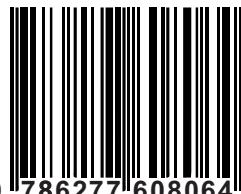
A Case Study of the Newly-Merged Districts of Khyber Pakhtunkhwa



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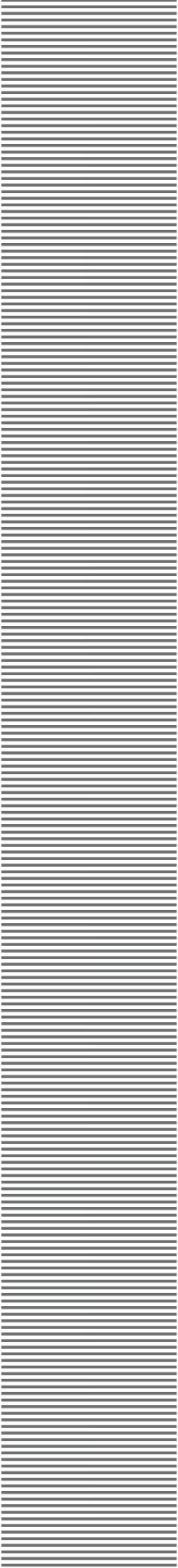
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Acronyms

ANP	Awami National Party
DC	Deputy Commissioner
FATA	Federally Administered Tribal Areas
FCR	Frontier Crimes Regulations
HI	Historical Institutionalism
JUI	Jamiat-e-Ulama-e-Islam
NI	New Institutionalist or New Institutionalist
NMDs	Newly-Merged Districts
PA	Political Agent
PMAP	Pakhtunkhwa Mili Awami Party
PTM	Pakhtun Tahaffuz Movement
RCI	Rational Choice Institutionalism
SI	Sociological Institutionalism
TPP	Tehreek-e-Taliban Pakistan

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We as a team of the National Influencers conducted this study in an uncertain law and order situation currently prevailing the newly-merged districts of Khyber Pakhtunkhwa. To say the obvious, carrying out qualitative fieldwork is almost impossible without creating a trust relationship with important gatekeepers. We thank Mr. Maulana Khanzeb, Malik Shah Wali Khan Mamoond, Salahuddin Khan, Ajmal Khan, Khalid Habib, Advocate Jabir, Malik Javed Khan and Nisar Baz of Bajaur who helped us collect data in Bajaur district. We are also indebted to Malik Iqbal Khan Afridi, Malik Nisar Khan Afridi, Saeed Afzal Shinwari, Khan Muhammad, and Said Nazir of district Khyber, who gave us a wholehearted support in providing access to the respondents. Finally, we express our gratitude to the official representatives of the Directorate of Human Rights Khyber Pakhtunkhwa, Commerce and Industries Department and Police Department, and local administration and civil society elite who were interviewed for the purpose of this study. This research would have been incomplete without their support and cooperation.

Abstract

This study is an attempt to analyze the process of the state-sponsored institutional transition in the newly-merged districts of Khyber Pakhtunkhwa – from a traditional, tribal order to a rational, relatively liberal state-order. Relying on historical institutionalist framework, we address the following questions: Does institutional transplantation as a strategy to trigger an intended social change works invariably? And, how do the newly-established institutions in the tribal Pakhtun belt of Pakistan interact with the extant traditional institutions and customary practices of the local population? To answer these questions, we employ qualitative methods of data collection and analysis. Our major sources of evidence include focused group discussions, elite interviews, and personal observations. In the light of the data we collected from the field, we conclude: 1) that the newly instituted (relatively liberal) order – or at least some elements therein – is in conflict with an “ideal Pakhtun” tribal character of the newly-merged districts; and, 2) that majority of the indigenous population are disillusioned with the newly-instituted state-order: they question both the will and capacity of the state to actuate socioeconomic and political transformation of the tribal Pakhtun belt of Pakistan. In the light of our research findings, we propose that, besides forcefully asserting its sovereign rights to govern the newly-merged districts, the state needs to introduce several policy reforms in order to encourage democratic accountability, formalization and digitization of market, and strong civil society and professional organizations. We emphasize that these (and similar) policy measures will prove instrumental in (re)building (and maintaining) trust between the state and society; in transforming the structures of incentives in favor of the newly-instituted state-order; and, in inspiring the indigenous society and market get integrated with the rest of the country and beyond.

Institutional Transplantation and Reconfiguration of Incentive-Structures in the Newly-Merged Districts of Khyber Pakhtunkhwa

Introduction

In 2018, the state elite of Pakistan thought it an opportune moment to replace the British colonial instruments of governance in its northwestern, Pakhtun borderland, the erstwhile Federally Administered Tribal Areas (FATA), with a relatively liberal constitutional framework governing the rest of the country. In addition, the areas constituting FATA were merged into the adjoining province of Khyber Pakhtunkhwa by making necessary changes in the Constitution of Pakistan through the Twenty-fifth Amendment. Before merger, society in FATA was left to its own devices to regulate individuals' behavior – through a traditional, tribal order, popularly known as *Pakhtunwali*. Not inconsistent with the traditional order (and will) of the indigenous population, the colonial institutional order in FATA espoused the principles of 'internal autonomy' and 'collective responsibility' of the tribes vis-à-vis the colonial Raj, and later on, Pakistan. Up until 2018, the state of Pakistan did not disturb the colonial governance order in the erstwhile FATA either, given its cost-effective nature.

The Twenty-fifth Amendment signifies a deliberate act on the part of the state elite of Pakistan to abandon the twin principles of 'internal autonomy' and 'collective responsibility' of the tribes of FATA in favor of democratic governance – espousing the principles of individual freedoms and responsibilities, at least in theory. Consequently, the inhabitants of the Newly Merged Districts (NMDs) – erstwhile FATA – are expected to behave according to the 'dictates of the state', instead of following their traditional collective wisdom, which they have inherited and adapted over centuries-long, contingent course of their existence as a political community.

Drawing on historical institutionalism, this study seeks to address the following questions: Does institutional transplantation, as a strategy to trigger an intended social change, works invariably? How do the new institutions, such as 'the Code of Civil Procedure (CPC)', 'the Pakistan Penal Code (PPC)', and 'the Code of Criminal Procedure (CrPC)', occasioned by the Twenty-fifth Amendment, interact with the extant traditional institutions and customary practices of the local population? Above and beyond, how does the common person of these areas see the change?

We employ qualitative methods of data collection and analysis. Our primary data sources include focused group discussions, local elite interviews and personal observations. We also rely on secondary sources, such as official documents, books and papers, for the historical, political and anthropological context of the study.

This paper is divided into six parts: the first part of the paper briefly discusses the relevant literature

that helps us formulate and test our hypotheses. The second part of the paper is a brief description of the universe of our study. Part three outlines the methodology of the study. The fourth part of the paper discusses the nature of society and people in the NMDs – their moral ideals and their traditional social order. Part five discusses the recent political history, which we believe has greatly influenced the current institutional trajectory of these areas. Part six of the paper analyzes the data we have collected from the field. The final part of the paper consists of our conclusions and relevant policy recommendations, which we consider necessary in order ensure a steady institutional transformation from a traditional to a rational order in the NMDs – if such a transformation is desirable.

Theoretical Framework and Hypotheses

To explain the process of institutional transition in the newly-merged district of Khyber Pakhtunkhwa, we employ historical institutionalism as our theoretical framework.³ Historical institutionalism helps us address the following questions, which are pertinent to our study: Where do institutions come from? What do they do? How do they do it? How institutions interact with other social forces, such as socioeconomic, political and discursive/normative structures? And, what helps an institution persist, transform or even perish in and/or over time?

The strategy of an elite-driven transplantation of relatively alien institutions, which is frequently employed by rational choice institutionalism (RCI), is criticized for its grand-theoretic and context-insensitive, approach towards institutions and institutional change. The critics of the strategy, especially anthropologists and sociological institutionalists (SI), another version of the NI tradition, argue that it undermines contextual specificities, given its deductive and grand-theoretic assumptions about human preferences and behavior. They maintain that such a universalist approach tends to ignore the instrumentality of the indigenous moral and cognitive templates for interpretation and action with regard to individual choices and behavior. In other words, SI posits that socially approved moral templates and ethnolinguistic traditions play a vital role in structuring individual behavior and preferences. Accordingly, any institutional import or innovation that is not compatible with the cultural orientations and cognitive cues of the target population is based on an unrealistic assumption that ‘one size fits all’. Following the ‘goodness of fit’ argument, sociological institutionalists argue that more successful (i.e., more consolidated) political institutions have relatively deeper socio-cultural roots, and that any attempt at transplanting foreign institutions on local soil is less likely to yield the intended results (Kim, 1964; Helmke and Levitsky, 2004; Wadeen, 2002; and, Dryzek, 1996).

³ Historical institutionalism is one of the three major strands of new-institutionalism – the other two are sociological institutionalism and rational choice institutionalism.

Sociological institutionalism, however, is not good at generating claims that are generalizable enough to *meaningfully* study *comparable* cases. Hence, as stated above, we draw on the historical institutionalist version of new-institutionalism, which tries to generate a middle-range theory – a theory that is good at striking a balance between the particularistic stance of sociological institutionalists (and anthropologists) and the universalist argument of behavioralists and rational choice theorists. It is, “... on the one hand, sensitive to the problems associated with ‘conceptual stretching’ (Collier and Mahon, 1993), and on the other, [has] the ability to recognize ‘functional equivalents’ so that ‘apples’ (which may be distinguished and dismissed as ‘oranges’ by an untrained eye) are taken seriously and compared with other ‘apples’ (Locke and Thelen, 1995, cited in Kang, p. 223). In simple words, historical institutionalism tries to find a middle ground between the extreme universalism of rational choice theorists and the particularistic stance of anthropologists.

In contrast to rational choice institutionalism, historical institutionalism employs inductive methods of investigation. In addition, “... unlike the rational choice approach where the key question for actors is ‘how do I maximize my utility in this situation’, the key question from an historical institutionalist perspective is, ‘what is the appropriate response to this situation given my position and responsibilities?’” (Koeble 1995: p. 233; cited in Bell, n.d., pp. 7-8). It is worth noting that historical institutionalism does not reject the ‘rationality principle’ altogether. It rather believes in the situatedness of an actor’s agency. They do not consider institutions as a sufficient factor that shapes human preferences and choices. Accordingly, human agency is embedded in a complex web of (formal institutions) and other social forces, such as socioeconomic structures, discourses and socially-sanctioned moral templates (informal institutions), and power relations. In other words, “Individuals are viewed as ‘embedded’ in so many social, economic and political relationships beyond their control and even cognition that it is almost absurd to speak of utility-maximizing and rational behavior in a strictly economic sense.” (koeble, 1995; p. 235; cited in Bell, p. 6).

It goes without saying that historical institutionalism shares with sociological institutionalism its belief in the ‘logic of appropriateness’. Nevertheless, historical institutionalism conceptualizes the term in a much broader sense: it goes beyond moral templates to encompass contextual specificities, roles and rules, and power-relations while explaining the behavior of ‘situated subjects’

Historical institutionalism historicizes institutions. It views institution as a specific path taken by a political community at a specific historical juncture, called critical juncture, in order to create a Nash equilibrium, and hence to disincentivize noncooperation. While explaining the birth, survival or death of an institutional order, historical institutionalism emphasizes the role of power-relations. It takes a utility-

power approach to study institutions. Historical institutionalists explain institutional resilience in terms of “path dependency, based on positive feedbacks, learning, and choice within institutional constraints supported by an *elite group of actors*.” (Kang, p. 224; emphasis added). Moreover, institutional change happens when an institutional order loses its utility for the elite group of actors, because of the changes happening in the external and internal conditions of an institutional order, such as war, economic crisis and scientific and technological changes (for a more detailed study of historical institutionalism, see for instance, Thelen, 1999; and Kang, 2014).

To conclude, historical institutionalism helps us identify certain critical junctures in the institutional history of the newly-merged districts of Khyber Pakhtunkhwa (MDs). We argue that some exogenous factors such as the advent of the colonial rule in the region in the mid-19th century and the so-called global war on terror have significant imprints on the institutional trajectory of the tribal Pakhtun belt of Pakistan.

We argue that the colonial nature of the state is, at least partly, responsible for the survival of traditional, tribalistic order and practices in the areas now known as the NMDs. The colonial institutions, such as the FCR, established by the British Raj in India, as instruments of cost-effective governance, were also formally recognized and maintained by its successor state, Pakistan. These legal instruments were used by the state to control the region, primarily for strategic reasons, without incurring ‘unnecessary’ cost of administration on itself and without having any (legal) responsibility vis-à-vis the indigenous population. Hence, using FCR as an instrument of colonial governance in Pakhtun tribal areas, the state legalized the tribal order in the name of internal autonomy, on the one hand, and criminalized individual freedoms, such as free speech, assembly or association, on the other.

Drawing on historical (and sociological) institutionalist ‘logic of appropriateness’, we hypothesize that Pakhtunwali, as an informal institution, is one of the significant explanatory factors that govern the behavior of the indigenous population, which the colonial authorities were reluctant to disturb so as to avoid “unnecessary” cost. We further hypothesize, drawing on Helmke and Levitsky’s categorization, that the newly instituted, relatively liberal, rational order (or at least some elements therein) is in conflict with an “ideal Pakhtun” tribal character, which hampers the establishment of the newly-instituted (relatively) liberal order.

This begs an important question: why would the tribal people trade off their time-tested tribal-order for an unresponsive and weaker state-order. We argue, employing the concept of ‘situated rationality’, that if the state could somehow change the relative structures of incentives in favor of the new order, the road to transition will be relatively less bumpy. Nevertheless, we hypothesize that the state machinery is not that strong and efficient to change overnight the structures of incentives in favor of the new order. In

other words, we argue that transition from traditional order to a rational one is contingent not only on the will of the state elite but also on the state's capacity to disincentivize noncooperation.

Methodology

we employ qualitative methods of data collection (and analyses), which are briefly elaborated in the following lines:

Content Analysis

First, this study seeks to compare the institutional structures, before and after the merger, with reference to human rights, individual freedoms and dispute settlement procedures. Hence, it analyzes (and compares) the content of the defunct FCR regime; the informal Pakhtun social order; and the newly introduced formal institutions, guaranteed by the Constitution of Pakistan.

Interviews

In order to evaluate socio-political impact of both the defunct and new institutions, we interviewed the state functionaries who have served (or serving) in the newly-merged districts, including local police officers, district administrators, and human rights authorities. We also interviewed the socio-political elite of the NMDs, including both traditional and modern elite. Among the traditional elite, we interviewed the officially designated tribal elders (*Malikan*). The socio-political elite whom we interviewed included civil society activists. We interviewed 12 individuals; five among them are state functionaries, and seven among them are socio-political elite (including 2 women activists).

Focused Group Discussions

In addition, we conducted six focused group discussions (FGDs), three in various Tehsils of each district. The participants of the FGDs were randomly selected to make it sure that various segments of the population are represented – young and elderly people, educated and uneducated ones, lawyers, tribal elders, local political activists, elected members of the local governments, local journalists and human and women rights defenders.⁴

Secondary Sources

This study relies on secondary sources as well (books and articles), related (particularly) to the political and institutional history of the NMDs (see, bibliography).

⁴ A major limitation of this study is gender imbalance in its data sources. It is next to impossible for a woman in the NMDs to participate in public meetings, because of the patriarchal and segregationist nature of the society. As an alternative, we had to rely on proxies, such as female feminists belonging to the NMDs, who are socio-politically active to resist patriarchy in the NMDs as well and on our lifelong observations and experiences as members of Pakhtun society.

A Brief Profile of the Study Context

The newly-merged districts (NMDs) of Khyber Pakhtunkhwa constitute the north-western part of Pakistan – bordering Afghanistan to the north and west, Khyber Pakhtunkhwa province on its east and Baluchistan province on its south. The NMDs consist of seven districts and six frontier regions. Total area of the NMDs is 27,220 square kilometers (see Map , Annexure 1).

According to the 2017 census, total population of these districts is 5,001,676, with 3.21% annual birth rate. More than 98% of the inhabitants of the NMDs speak Pashto as their first language. More than 99% of local population is Muslim. The non-Muslim religious minorities include Sikhs, Hindus and Christian – in total around 50000.

The NMDs is one of the least developed parts of Pakistan. It is overwhelmingly rural: only 3.1 percent of its population lives in relatively established townships. Around 45% of the local population lives in extreme poverty. Its economy is primarily pastoral, with only 1,000 square kilometers of irrigated land. Other major sources of income include remittances, primarily for the gulf countries of Arabian Peninsula, and smuggling of contraband. Literacy rate in the NMDs is 28% - with only 8% among women. 57 percent of children of age 5 to 16 are out of schools.

As elaborated later in this paper, until 2018, the NMDs (then FATA) was formally recognized and treated as a self-governing tribal entity, first by the British Colonial Raj in India and then by Pakistan. Both the Raj and Pakistani state controlled the indigenous tribes of the NMDs through the principle of ‘collective responsibility’. Accordingly, if a member (or members) of a tribe posed a challenge to the interests of the state, the whole tribe would be punished.

This is also noteworthy that the NMDs had been used as a launching-pad of global Jihad against the Soviet Russia in Afghanistan. After the collapse of the socialist regime in Afghanistan, Pakistan continued to use these areas as a strategic outpost and as a safe haven for regional Jihadist elements – which Pakistan saw as strategic its allies against anti-Pakistan, Pakhtun nationalists both in Afghanistan and Pakistan.

Nevertheless, after the Taliban victory in Afghanistan, the armed Islamists have started behaving like a Frankenstein monster – posing a threat to peace and stability in Pakistan. Consequently, Pakistani military has launched several operations against the Islamic militants – primarily against the Tehreek-e-Taliban Pakistan (TTP). Recently, the government of Pakistan has announced yet another military operation to dismantle the terror networks in these areas and beyond. Hence, the newly-merged districts of Khyber Pakhtunkhwa are characterized by perpetual war and instability.

For the sake of this study, we have purposively selected district Bajaur and Khyber. Bajaur is the smallest of the NMDs in terms of territory, with an area of 1290 square kilometers. It shares a 52 kilometers border with Afghanistan on its west. On its north lies the district Lower Dir of Khyber Pakhtunkhwa; on its west lies Malakand division, and on its south, district Mohmand. Total population of Bajaur district is estimated to be 1,090,987. Literacy rate among the male population is 29.95%, and 7.8 among female. Agriculture is semi-arid. It grows wheat, maze and rice, besides various vegetables, such as potato, tomato, onion, and spinach. Major minerals include marble and nephrite.

Bajaur consists of eight tehsils. We conducted focused group discussions in three Tehsils: Nawagai, on the south; Khar, the district headquarters; and Mamund, which constitute the northern part of the district.

The second district focused in this paper is Khyber. It shares borders with Afghanistan to its north; district Kuram, on its south-west; Peshawar, the capital city of the province of Khyber Pakhtunkhwa, to its east. Total area of district Khyber is 2576 square kilometers. Total population of the district is 986,973. Literacy rate for male population of the district is 34.2% – 57.2% among males, and 10.1% among females. Total cultivated land in Khyber is 20,075 hectares, whereas the uncultivated land is 237,579 hectares, with 2070 hectares covered with forests. District Khyber has four tehsils. For the purpose of this study, we conducted focused group discussion in the two main tehsils – Bara and Landi Kotal.

Pakhtunwali: The Traditional Social Order in the Newly-Merged Districts

Almost every anthropological and historical account of Pakhtuns categorizes them as a tribal people –a society governed through a traditional, anarchic order.⁵ Notwithstanding the fact that Pakhtuns of Pakistan, in general, have evolved a great deal in terms of the state-society relationship, the then-federally administered tribal areas (FATA, now NMDs) can arguably be categorized as an anarchic society, along various indicators of the term. In their routine lives, a common inhabitant of the erstwhile FATA would have a very rare and brief encounter with the state – *a modern instrument of legitimate coercion*. Before FATA was merged with Khyber Pakhtunkhwa (KP), social order and solidarity were secured almost exclusively through a traditional order, popularly known as *Pakhto* or *Pakhtunwali*.

⁵ This, however, does not mean that modern state had altogether been nonexistent in the tribal Pakhtun belt of what now constitutes the north-western part of Pakistan. By the end of the 19th Century, the colonial state of the Great Britain had already established its suzerainty over the areas now known as the newly merged districts. After the end of the British Raj, the newly created state of Pakistan inherited the overlordship of these districts. Nevertheless, it would not be an exaggeration to say that the tribal people of the ex-FATA had never had a state of their own, in the modern sense of the word. The state elite of Pakistan continued to treat Pakhtun tribal areas, bordering Afghanistan, more as a strategic hinterland than a normal part of the country. It kept denying the indigenous people the right to (full) citizenship, until the special status of FATA was abolished in 2018.

Pakhtunwali constitutes what Durkheim calls the *collective conscience* of the tribal Pakhtun society.

By collective conscience he means:

The totality of beliefs and sentiments common to average citizens of the same society forms a *determinate system* which has its own life; one may call it the collective or common conscience.... It is, thus, an entirely different thing from particular conscience, although it is realized only through them.

(Durkheim, [1893] 1964, cited in Ritzer and Stepnesky, 2018:134; emphasis added).

As a ‘totality of beliefs and sentiments’ of a common tribal Pakhtun, Pakhtunwali signifies, and is constitutive of, one’s loyalty to their family and tribe; patriarchy and masculinity; collective responsibility; a limited notion of individual property and inheritance; and, aversion to hierarchy. Following Durkheim’s line of thinking, we argue that, until very recently, society in the erstwhile FATA could arguably be described as pre-modern one, in several ways – a society characterized by functional generalization; household self-sufficiency; lack of modern education and technology; very few economic activities; limited, intra-tribal trade and trust; and, absence of impersonal, rational structures of authority and security.⁶ In the erstwhile FATA, Pakhtunwali was (and still is, to a large extent) the most dominant, if not the only, source of social solidarity and coercion. It served (and still serves) as an informal institutional mechanism through which society was (and is) held together and cooperation was exacted.

We argue that the traditional mechanisms of social solidarity in the Pakhtun tribal areas of Pakistan have a “family resemblance” with Durkheim’s *mechanical solidarity*. Accordingly, these areas lacked (or had very limited) division of labor. Most (if not all) of the people were engaged in similar productive activities and had similar responsibilities. Most of the people had shared understandings, feelings and beliefs; therefore, they had stronger collective conscience, as opposed to modern societies, which is unified through *organic solidarity* – a society characterized by a clear division of labor, and has rational, formal regulatory mechanisms. It is noteworthy that modern

⁶ It must be noted that we do not borrow Durkheim’s binary of modern-vs-premodern uncritically. As elaborated later in this paper, we rather believe that societies are not static entities but processes that are constantly evolving, though at varying pace – a process that results from complex interactions among various social forces and phenomena, such as scientific and technological products, social and political institutions, geography, market, demography, and collective conscience etc. – in a word, the *mode of existence* of a people. Durkheim’s binaries, however, help us locate an “ideal” Pakhtun tribal society on the “modern and pre-modern” continuum– as social categories that exist in the popular imagination and language, at least.

societies, too, have a collective conscience, but it is relatively weak (Durkheim, [1893] 1964, cited in Ritzer and Stepnesky, 2018:138-9).

To further elaborate the difference between modern and pre-modern societies, we rely on Anthony Gidden's (1972) criterion, though very *cautiously*⁷. In view of that, the two societies can be distinguished from each other along four dimensions of what Durkheim calls collective conscience – volume, intensity, rigidity and content. “*Volume* refers to the number of people enveloped by the collective conscience; *intensity*, to how deeply the individuals feel about it; *rigidity*, to how clearly it is defined; and *content*, to the form that the collective conscience takes in the two types of society” (ibid, 139). Hence, concerning its volume, we argue that Pakhtunwali is quite pervasive, given the fact that organized counter-cultures are too gelatinous and fragile, if not non-existent altogether.⁸ An overwhelming majority have consensus over the meanings of certain core moral ideals of Pakhtun society – notwithstanding some nuanced, disorganized, and marginalized *reinterpretations* of these ideals. The *intensity* of Pakhtunwali in the NMDs can be gauged from the fact that a common tribal Pakhtun would consecrate Pakhtunwali as Islamic in its essence. Amir Hamza Khan, one of the most renowned 20th Century poets of Pakhto/Pashto, says it so aptly.

Da Pakhtu fitrat may dumra Islami de

Ka Islam na way no hum ba Musliman wum.

Why do individuals feel emotionally attached with culture/collective conscience in a mechanical society? We believe that in such a society, language/public opinion is the most formidable sanction behind the collective standard of appropriate behavior. To regulate individuals' behavior, they are so trained through a rigorous system of socialization in the collective myths and language of society that they consider them as something divinely ordained – something that is good-in- and for-itself. Without some external shock, such as technological innovation, material conditions or foreign invasion, they would not bother about rationalizing their collective conscience.

Rigidity of Pakhtunwali, as the collective conscience of the tribal Pakhtun belt, can be assessed from the fact that it is so clearly defined that an overwhelming majority of the local population in

⁷ This point is elaborated later in the paper.

⁸ By counter-culture we mean a conscious and concerted effort to destabilize the existing discourse of Pakhtunwali, as a system of significations, and to assign new meanings to certain core ideals of Pakhtunwali, such as *izat* (honor), *ghairat* (dignity), *narthob* (masculinity), *milmastya* (hospitality), and *badal* (reciprocity) etc.

the NMDs has a consensus over the meanings of various core elements of Pakhtunwali. Finally, concerning the *content* of Pakhtunwali, in its ideal form, it is essentially *collectivist*, i.e., anti-individual in nature. As opposed to Durkheim's modern society, the customary laws in the tribal Pakhtunkhwa are repressive, given their extensive acceptability, intensity, rigidity and collectivist nature. On the contrary, as Durkheim argues, law in modern societies tends to be *restitutive*, "... which requires offenders to make restitution for their crimes. In such societies, offences are more likely to be seen as committed against a particular individual or segment of society than against the moral system itself" (Durkheim, [1893] 1964, cited in Ritzer and Stepnesky, 2018:138-9).

Pakhtun tribes, both in the present-day Afghanistan and Pakistan, have evolved a tribal system of security – alliances among friend and families. An individual's rights – if there were any such thing as *individual* rights – were secured through private mechanism of deterrence – family and friends. Their tribal code was repressive, in Durkheimian sense (discussed above). If a member of the tribe or sub-tribe posed a serious threat to social solidarity, the whole tribe may get mobilized in the form of *Lakhkar* or *Lashkar*⁹ to punish the miscreant. The punishment imposed by the *Qaam* (tribe) through tribal Lakhkar would be directed, more often than not, against the (immediate or extended) family of the offender. It could assume either the form of forcing the family of the accused to leave the tribe or the Lakhkar may be asked to burn the family-house of the offender or force him pay heavy fines – or both.

Universal private property right, in the modern legal sense, was non-existent in the erstwhile FATA (now NMDs). An individual may inherit property from *his* male-parent¹⁰ and extended family, but would not be able to dispose it off at his *free* will. He would not be able to sell or utilize his property if another member of the family or tribe-imposed *Ghag*¹¹ on his property. Ghag was a tribal mechanism of imposing sanctions on some enemy. To reciprocate, the other party would also impose Ghag on the property or social relations of the initiator. The matter would ultimately be settled through a tribal Jirga, an arbitration council in the modern sense, according to which the willingness of *all the concerned parties* was necessary. However, given the egoistic nature of tribal

⁹ An armed band of volunteers, particularly the tribal youth, mobilized spontaneously and temporarily, to punish a miscreant.

¹⁰ Women were (and are) not given share in property of her family in FATA.

¹¹ *Ghag* literally means voice. In Pakhtun customary code it refers to a tribal practice whereby an adult male makes a public proclamation that something is disputed, and should be treated as such, by everyone else. It is worth noting that Pakhtuns of the tribal belt would frequently impose ghag on unmarried girls, too, given the patriarchal nature of the society wherein women are treated like property of a patriarch – and even other male members of the extended family. Hence, no one would be able to utilize or purchase the property or marry the girl under ghag, if they wanted to avoid violence and protracted family feuds.

feuds and rivalries, it would be quite difficult to compel the stronger and more influential party to resolve the issue through Jirga.

Women were (and are) subjected to the worst kind of patriarchy, an institutional order wherein women were treated more like a patriarch's property than living and breathing human beings.

Before the Afghan Jihad, Islam, in an ideal Pakhtun tribal belt, had almost nothing to do with routine social relations and practices of the indigenous population of FATA. Religion was restricted to rituals related to marriage, divorce and death. Religious/spiritual authority, which would go by several names, such as *Mian*, *Sayid*, or *Sahibzada*, are hereditary in nature. They would not interfere in the routine social affairs, which were traditionally managed by tribal elder(s) – *Malik* or *Mashar*. The religious figures would lead daily prayers and religious rituals and heal both mental and physiological illnesses of their followers through *dam*, *durood*, i.e., by reciting some holy text or *mantras*. Some would also be experts in *Hikmat* – traditional/herbal medicines. Besides, the tribal belt of Pashtuns was almost unfamiliar with the institution of *Mulla* – a non-hereditary religious position, with almost similar functions as those performed by a *Mian*. Therefore, Pakhtuns would use the two terms together, i.e., *Mian-Mula*, to refer to the traditional religious/spiritual authority in their society.

Drawing on sociological institutionalist framework, we recognize the constitutive nature of social norms and cultural patterns – constitutive of the subject-position, “social reality”, and behavior of individuals. Nonetheless, relying on post-structural ontological and analytical insights, we also argue in this paper that the worldview and collective norms of a people are not only *constitutive* of the ‘social reality’ but are also *constituted* by *external* phenomena – external to what Durkheim call the collective conscience of society, i.e., the dominant moral template. Hence, to say the obvious, society in the NMDs has never been totally isolated and insulated from other societies and occurrences that are external to the collective conscience of the inhabitants of these districts. It has been exposed to, and influenced by, such external forces as scientific advancements and technological innovations, colonial state-apparatuses, globalization and foreign interventions, media (particularly, social media), and modern market and regional trade. As stated earlier in this paper, we do not believe in the rigid dichotomies of modern-vs-premodern. Rather, we believe in a non-essentialist and overdetermined nature of social reality and existence. What accounts for the historical evolution of human society is a complex web of causality among various interdependent phenomena and social forces – a human condition wherein mono-causal, single-axis explanations tend to be misleading.

In a nutshell, we argue that Pakhtunwali, as a normative order, shapes (to a large extent though) the sense of identity and notions of a ‘*normal*’ human existence of the inhabitants of the NMDs. It, therefore, has deep imprints on their *praxis* as a political community. It is one of the necessary conditions that have been influencing their structures of power, their networks of trust and rivalries, and their mental/linguistic artifacts (i.e., science and technology). Nevertheless, Pakhtunwali, as a normative system, also reflects the mode of existence of the Pakhtuns of the NMDs. As mentioned earlier, for the purpose of this paper, by *mode of existence* we mean an aggregate of various material and non-material social forces, such as culture and language, media, science and technology, politics and market, and formal/state institutions, and demography et cetera. Human reason/culture and agency, thus, have a contingent character – both spatially and temporally. Though there is a popular character, which goes by the name of Pakhtun, it is constantly evolving – both in popular imagination and in practice.

Looking Beyond Pakhtunwali: Critical Junctures in the Recent History of the NMDs //

Several factors/events – mostly abrupt events – have constantly been (re)shaping the imagination and character of a common Pakhtun of the newly merged districts of Khyber Pakhtunkhwa. We call such events as ‘critical junctures’. By critical junctures we mean certain (abrupt) historical events which render the intellectual/cultural and political status quo less efficient and, therefore, untenable. Such a situation forces a society to devise new ways of thinking and new patterns of ‘*normal*/legitimate behavior in order to maximize their chances of a *better* survival. Hence, critical junctures, according to the historical institutionalist tradition, helps us explain both the origin of, and changes in the formal and informal institutional order of a society. In the following lines we identify and briefly describe two significant political events in the recent past of the inhabitants of the NMDs that, we believe, had (and have) palpable effects on their traditional way of thinking and behaving.

British Colonialism and the Frontier Crimes Regulation

The first among recent critical junctures in the collective life of the tribal Pakhtuns as a political community was their encounter with *modern state*,¹² first in the form of the British colonial state, and then with the newly-created, post-colonial state of Pakistan, which was not (and is not, to a large extent) distinguishable from its predecessor in terms of its character and behavior vis-à-vis the indigenous people of the *officially-designated* tribal belt of Pakhtuns. For one reason or another,

¹² Modern state here refers not just to the establishment (and consolidation of) monopoly over legitimate coercion but also to non-patrimonial, rational structures of public policy and governance.

Pakhtuns of the erstwhile FATA have failed to have a state which they could have called their own – a state which would treat them as its citizen, without any (legal) discrimination against them. The English colonialists instituted a different structure of control in the tribal Pakhtun belt from the rest of the British India. The British regarded these areas as a strategic backyard to safeguard the mainland India – the jewel in the British Crown – from any possible encroachment by the Russian bear. “In order to avert any Russian adventurism in India, British thought it more reasonable to safeguard the gates to India in Pashtun and Baloch lands – the Bolan Pass and Khyber Pass” (Khan, 2018, p. 89). Alluding to what is known as ‘the forward policy,’ Oliver (1890) argues that it was “... better to deal with an enemy outside the gate of the fort, than to let him in, and fight him afterwards inside” (cited in Khan, p. 10). “... These were the days of the Great Game, a chess match between the Britain [empire] and the expansionist Russian empire over position and influence among the tribes, mountains, and steppe of the Central Asia. Any unruliness in the border regions, it was feared, could be an opportunistic invitation or even a plot by the Russians to sow political discord within the British domain.” (Akins, 2017, p. 5).

Moreover, the British colonial encroachment in the tribal Pakhtun belt was violently resisted throughout the late 19th Century, albeit in a disorganized and erratic manner (Khan, 104; for more details, see Rome, 2013). As stated above, the British Raj in India could not remain unconcerned about the incessant Pashtun uprisings in the north-western peripheries of the Raj, which could ultimately invite Russian interference in the region to destabilize the British colonial rule in India. Direct control of these regions was not a better option either. In other words, installation of all (or most) of the governing machinery, which was already operative in the mainland British India, could be a too costly, and hence an unsustainable enterprise.

The Raj in India adopted a three-tiered border approach to the security of the mainland India, which Lord Curzon, the then-Viceroy of India (1899-1905), referred to as the ‘threefold frontier’. The first frontier encircled the mainland India where the colonial authority had instituted modern colonial state apparatuses, such as modern civil and criminal codes and procedures, modern bureaucracy and civil services, social and political infrastructures, political parties, and (partially) elected councils. “The second zone consisted of the border regions between the first frontier’s border and a demarcated international border that the Raj laid claim to but was unable to impose its laws or political control from Calcutta (and later New Delhi)” (Akins, p. 4). The second zone included the Pakhtun mountainous terrain along the border of the present-day Afghanistan, where the British preferred to exert limited control. The third frontier consisted of the protectorates, such as

Afghanistan, Nepal, Tibet, and Sikkim, where, as mentioned above, the Raj in New Delhi did not exert any direct legal control (*ibid*).

Consequently, the Raj devised and established a more cost-effective institutional framework for the second frontier zone, under the policy of leaving the “ungovernable” virtually ungoverned, as far as the indigenous tribes did not pose a direct threat to Raj’s interests in the region. To control crimes – in fact, crimes against the interests of the Raj – the colonial authorities devised an institutional order, called the Frontier Crimes Regulations (FCR), which espoused the principles of internal autonomy of the tribes and collective responsibility of the whole tribe, if any member of the tribe challenged the suzerainty of the Raj.

The FCR recognized the internal autonomy of the tribes in the sense that they were left to their traditional devices, Pakhtunwali (discussed above), for all practical purposes to maintain social solidarity and control individuals’ behavior, though in theory the FCR included such provisions as to empower the local administrative officer, Commissioner or Deputy Commissioner (also called Political Agent or Assistant Political Agent respectively), appointed by the Raj, to interfere in local disputes that could potentially result in tribal feuds and homicide. To resolve local disputes or punish the miscreants, the Political Agent (PA) was assisted by a Council of Elders, appointed by the PA. The PA, nonetheless, was not legally bound to follow the recommendations of the Council. He was authorized either to ask the Council to revisit its findings or constitute another Council to review the matter or refer the case to a civil court, if he was not satisfied with the findings of the first Council (FCR, Section 12). The FCR empowered the PA, through the Council, to punish an offender with rigorous imprisonment for a term not exceeding ten years or the offender could be exiled for a term not exceeding a period of seven years (FCR, Section 13).

It is worth noting that the FCR also included provisions that did not correspond to the local customary practices, such as Section 30, which provided for punishing a married woman accused of adultery with imprisonment for a term not exceeding five years, or with fine, or with both.¹³ Nevertheless, neither the locals would refer such matters to the formal authorities nor would the latter take interest in such matters. In practice, the PA office was concerned more with maintaining inter-tribal peace, when a dispute between the tribes could lead to bloodshed, or when a member or members of a tribe posed threat to the geopolitical interests of the Raj – and later, to the interests of the mainland Pakistan.

¹³ Pakhtunwali, on the contrary, says that adultery or fornication be punished with death.

Under the principle of collective responsibility, the PA was empowered to punish a whole tribe or a whole village, if the tribe or a member(s) thereof behaved in a manner prejudicial to the interests of the Raj. The PA could arrest any member of a tribe, if the tribe or a member thereof was accused of acting against the interests of the Raj. He could levy fines on a rival tribe. Moreover, the FCR empowered the PA to demolish a whole village or part thereof, if the interests of the Raj so required. The PA was also empowered to call in the military, if law and order situation was likely to get out of the control of the local administration.

As stated earlier, the FCR kept denying all (or most) the democratic rights of the indigenous people, such as the right to fair trial and freedoms of speech, association and political representation until it was abolished in 2018.

It is worth noting that the British authorities introduced modern education, health, and transport facilities in the region – a limited number of schools and some basic health facilities and roads were constructed only in the areas that were administratively accessible and did not incur high cost on the exchequer of the Raj. The locals were exempt from taxes. In addition, to co-opt the local population, the British colonial authorities recruited them in the colonial security forces. The colonial authorities also recruited the indigenous people to form a ragtag security force called the levies or *Khassadar* (see Naseer, 2015:29). A Khassadar could pass on the position to any member of the family or could sell the position in local market to another member of the tribe. Hence, the position of Khassadari was more like a personal entitlement than a public position in the modern bureaucratic sense of the word.

Another significant institution created by the colonial authorities was that of *Speengiray*¹⁴ or *Marshar* (elders) or *Malik*, i.e., the local elders, who would also be appointed as members of the Council of Elders to assist the PA office in resolving local issues and disputes. The Speengiri (plural of Speengiray) would also assist the local authorities to keep them informed about the local affairs, and would help them in identifying “miscreants”. A speengiray was also empowered to attest citizen registration documents of a member of his tribe, such as domicile and National Identity Card (NIC), before such documents were issued by higher authorities. In return, the PA office paid them with what was locally known as *dastarkhwan*¹⁵. In addition, the British colonial authorities would pay *Moujib*, a stipend paid to prominent families and tribal elders so that they remain loyal to the British

¹⁴ Speengiray literally means a white-bearded man. Hence, the term signifies a person having experience and wisdom.

¹⁵ The literal meanings of *dastarkhwan* is a ‘piece of cloth used to eat meals’. Dastarkhwan, in our context, means an unfixed amount, depending on the will of the PA, paid to a local Malik to run the expenses of his family and *Hujra* (i.e., guesthouse), and, hence, to financially assist them in exerting influence and control over his fellow tribesmen on the behalf of the British Raj.

Raj. Later, the Pakistani state would extend the practice to co-opt local civil society, including local journalists, to make and keep them subservient to the whims of the local state-authorities.

The British withdrawal from the region resulted in the birth of Pakistan, in 1947, which inherited the Pakhtun tribal belt. Pakistan did not disturb the institutional status quo in the region, given its cost-effective nature, notwithstanding some minor changes introduced overtime, such as adult franchise, introduced in 1996,¹⁶ and the right to party-based elections was recognized in 2013.

Following the rise of religious militancy and counter-militancy operations in FATA (now NMDs), after the US invasion of Afghanistan, the state elite of Pakistan was convinced to extend the Constitution of Pakistan to FATA in order to mainstream the region, and hence to secure national integration. Consequently, the FCR was abolished and FATA was merged with the adjoining province of Khyber Pakhtunkhwa to be (unofficially) called as the newly-merged districts (NMDs) – or sometimes the tribal districts.

As stated above, we consider the British colonial advent in the region as a critical juncture in the recent history of Pakhtun tribal society. We treat it as a significant historical event that shaped the institutional trajectory of these areas. Counterfactually, one may argue that the Pakhtun tribal belt would have taken a different institutional path, had not the British imposed its colonial rule over these areas. They would argue that Pakhtuns could have evolved a state of their own: perhaps these areas could be part of a greater Afghanistan, where they could live in peace with themselves – an idea still entertained by hardcore, radical Pakhtun ethno-nationalists on both sides of the Pak-Afghan border – also known as the Duran Line. Though it was not an impossibility, we do not believe in mono-causal, ahistorical reasoning concerning the present state of the tribal society. Rather we rely on postmodern, historicist line of thinking, and on historical institutionalist logic, to argue that colonialism, as an historical fact – an occurrence or phenomenon – is one of the significant factors, from which we cannot disentangle the present of the people. What institutional path would the NMDs have taken, had colonialism not happened as an historical fact, is not a question of our concern in this paper.

Hence, the colonialist logic of cost-effective governance of the tribal belt of Pakhtuns resulted in the formal recognition of the tribal, collectivist, practices of security and responsibility, which was in turn occasioned by marginalization – rather suppression – of democratic and “progressive” voices

¹⁶ It should be noted that even after the state granted the people of FATA the right to directly elect their representatives to the national legislature, they still remained disenfranchised till 2018, when the special status of FATA was abolished: Before 2018, Pakistani laws were not directly extendable to these areas. According to Article 247 of the 1973 Constitution of Pakistan, only the President of Pakistan could decide which laws and regulations should or should not be applied to FATA.

and subcultures in these areas, such as Bacha Khan's *Khudai Khidmatgar* (God's Servants) movement.¹⁷ We further argue that the state-sanctioned, protracted tribal structures and practices of governance resulted in sub-optimal utilization of human skills, and of material resources in the Pakhtun tribal belt of the present-day Pakistan.

The Spillover of Afghan Jihad in FATA and its Aftermath

The 1977 Soviet-sponsored socialist coup in Afghanistan invited US intervention in the region in order to fight the “monster” of communism – a direct threat to liberal order and, ultimately, to the interests of the West. The US relied on religious elements in the region as the most willing and formidable force to fight communism in Afghanistan (and Pakistan). Pakistan, too, saw itself (and behaved) as a “natural” ally of the West to fight both communism and Pakhtun ethno-nationalism across the Pak-Afghan Pakhtun belt – which, in its extreme form, undermined the territorial integrity of the country. Consequently, the tribal Pakhtun belt of Pakistan (then called FATA) was used as a launching pad of Jihad against communism in Afghanistan.

After the defeat of Soviet Union in Afghanistan, Pakistan continued supporting the jihadi groups in Afghanistan, who were later on replaced with the Taliban, to keep the nationalist and progressive forces out of power. Following the US invasion of Afghanistan in 2011, the Taliban regime was replaced with the US-backed ‘republican’ regime. Pakistan considered the latter as a threat to its integrity, because of its nationalist posture. It, therefore, continued supporting Afghan Taliban fighting against the NATO and Afghan security forces in Afghanistan. In order to provide safe haven to Afghan Taliban – officially characterized as the good Talban – Pakistan relinquished its writ to the Tehreek-e-Taliban Pakistan (TTP) – the bad Taliban, according to the official discourse of Pakistan. In other words, the TTP was formed (and primarily based in) the tribal Pakhtun belt to support the Afghan Taliban in their Jihad against the US and Afghan regime. The policy of relinquishing its writ to the TTP in the Pakhtun tribal belt was somehow instrumental in creating a smoke-screen for its duplicitous policy of supporting the Taliban resistance in Afghanistan, on the

¹⁷ Bacha Khan's (1890-1988) Khudai Khidmatgar (KK) believed in peaceful resistance to the British Raj in India, on one hand; and, on the other, it sought to reform Pakhtun society, along democratic lines, wherein rule of law, gender equality, secularism, and socio-economic uplift of the indigenous population could be guaranteed. It is worth noting that the KK was an ally of Gandhi's Indian National Congress in its struggle against British colonialism. The KK was brutally suppressed, first by the Raj, and then by its successor, Pakistan. Bacha Khan's legacy is currently claimed and represented primarily, but not exclusively, by the Awami National Party (ANP). The ANP's political agenda includes democracy and human rights (including gender equality), secularism, and a loose federation in Pakistan. The ANP has been politicizing the ethno-historical identity of Pakhtuns of Pakistan to (apparently) reestablish cultural and socio-economic links between Pakhtuns on both sides of the Pak-Afghan border, without questioning the *de jure* status of the border. It is also a significant political force resisting religious extremism in the region. It does not recognize the legitimacy of the current Taliban regime in Afghanistan.

one hand, and playing as the major non-NATO ally of the US in its fight against global terrorism, on the other hand.

Pakistani military also launched several military operations against the “bad” Taliban. These operations, however, were more either a whitewash or against Al-Qaida and other splinter groups, which resulted more in civilian casualties and displacements than in dismantling the terror syndicate operating in, and from, FATA.

Down the road, a considerable number of the local population of FATA was gradually convinced that Pakistani military was the architect and patron of the terror syndicate. Eventually, they launched a peaceful resistance movement – the *Pakhtun Tahaffuz Movement* (PTM), which publicly accused the state of using terror as an instrument to achieve its foreign policy objectives in Afghanistan and to repress Pakhtun nationalism at home.

Hence, we argue that militancy (and counter-militancy operations), and the resultant local resistance to Pakistan’s Afghan policy, marks a significant moment in the recent history of FATA. The state elite of Pakistan was convinced that it is gradually losing control over its tribal Pakhtun belt, and that the *colonial* institutional order was no more effective to peacefully control these areas. Therefore, it decided to extend the Constitution of Pakistan to these areas and merge them with Khyber Pakhtunkhwa, which signifies the import of modern state institutions, services, and guarantees.

In the following lines, we turn to the question as to how the traditional order of society is currently interacting with the recently instituted rational order in the NMDs. In addition, we address the question as to what policies and strategies the state and civil society elite need to adopt in order to expedite the transition.

Research Findings and Analysis //

As mentioned above, this study is designed to address the following questions: How does the local population perceive the abolition of the special constitutional status of FATA and its merger with Khyber Pakhtunkhwa? How has the process of merger so far affected their routine lives, social relations and political expectations? Could the transition be smoother and faster, had some different institutional and policy measures been taken over time? This study also focuses on the question as to how can things be fixed, if they are not working the way they were intended to. It is worth noting that our interviews and discussions with various respondents covered several socio-economic, administrative and political issues,

such as human rights, political freedoms and activism, gender equality, policing, dispute resolution and adjudication, and market.

To summarize popular perceptions of the merger, we categorize the response of the participants of the study into three broad categories; the *disenchanted ones*; the *realists*; and, the *skeptics*.¹⁸

The Disenchanted Ones

The first category, which constitutes the majority (roughly 60%) of our respondents, had higher – rather unrealistic – expectations from merger in terms of human freedoms, accountability of public authorities, and administration of public services, such as peace and security, health and education, and justice. They complained about the scarcity of human freedoms, though they admitted that, in relative terms, the merger has resulted in more political freedoms, such as freedom of association, speech, assembly and movement. When they were asked that whether they felt more empowered vis-à-vis arbitrary rule of both the state and society, they said, yes. They agreed that, with the abolition of the principle of collective responsibility, they are no more responsible for the unruly behavior of their kith and kin. This, accordingly, gives them a feeling of personal security and individual freedom and responsibility.

Their disenchantment with the merger is not unwarranted, we argue in the light of our respondents' experiences with (and/or their perceptions of) public authorities and state policies. The elected members of the local bodies felt disempowered and deficient in resources. Majority of the respondents accused the state of not keeping its promises, such as the promise of PKR. 100 billion developmental funds from the federal budget in order to mainstream these areas. An overwhelming majority of our respondents complained about the undue interference of the military in civil administration. They perceived the civilian authorities, especially the police, as corrupt, inept, and unaccountable to the public. The business community complained against the over-bureaucratization of market-place.

The local authorities, including police and administration and legal fraternity, however, argued that their policy choices were constrained, and operations obstructed, by various factors, such as scarcity of resources (both human and material), social conservatism, and trans-border terrorism.

The Realists

The term realist, for the purpose of this study, refers to those respondents who, while supporting the idea of merger, could foresee the challenges and hardships involving the process of transplanting

¹⁸ This is worth mentioning that these categories are not precise in the sense that they can be clearly distinguished from each other. On several issues, such as policing, human rights, and women rights to inheritance and education, their views were overlapping, as we will see later during this section of the paper.

relatively alien institutions. This category of respondents included lawyers, students, civil society activists, social workers, journalists, and supporters of various political parties – except the supporters of an orthodox Islamist party, *Jami’at Ulema-e-Islam* (JUI), and some reactionary Pakhtun nationalists, such as *Pashtunkhwa Milli Awami Party* (PMAP).

The realists hardly constituted 25% percent of our respondents. They acknowledged the spatial and temporal contingencies and complexities involving social change and political development. They recognized the issues raised by those who felt disillusioned with the process of merger and its concomitant institutional order. They were very critical of the role played by the military in the public life of the NMDs. They were cognizant of the ineptness of civil bureaucracy and of the lack of accountability of public policy too.

Nevertheless, the realists also condemned such tribal practices as *Ghag*, collective responsibility, patriarchy and *Jirga* system. They believed that the *Jirga* could be manipulated against the weaker party. They opined that although Pakistani judicial system was too costly and inefficient to resolve disputes, it simultaneously lowered the cost of *Jirga* (arbitration) to amicably resolve a dispute. Accordingly, after the merger, a disputing party that is not willing to resolve a dispute peacefully, through *Jirga*, can be forced to have the dispute resolved through a court of law. After spending some time in the courtrooms, the disputing parties are very likely to have the issue resolved through *Jirga* – a relatively low-cost mechanism of resolving social disputes and conflicts. The realists, nevertheless, emphasized the need for some alternative mechanisms of resolving disputes that could be less costly and more efficient. They also felt the need for land settlement and registration in order to avoid disputes over land – a major source of disputes in the merged districts. Besides, as stated above, people from business community complained of the cumbersome bureaucratic processes of doing business.

The realist also recognized the fact that the introduction of criminal and civil codes and procedures of Pakistan encouraged them to claim their basic legal entitlements – augmented by their increased access to media and courts, following the merger. To our surprise, one of the lawyers told us that more than one thousand *Khula*¹⁹ cases have been filed in Bajaur district – something almost impossible and undesirable in the Pakhtun tribal code. It is worth noting that according to the tribal practices of Pakhtuns in the ex-FATA, a woman was not allowed to dissolve her marriage and remarry – if she wanted to. If she was not happy with her husband (and/or her husband’s family), the most she could do was to leave her husband house and live with her father or brothers. The victim’s family could only mobilize their social networks and influence to dissolve the marriage through some *Jirga*. In such cases, her husband was empowered to

¹⁹According to Islamic jurisprudence, *Khullah* is the right of a women to have her marriage dissolved through a court of law.

dissolve the marriage on his own terms – including imposing Ghag, which would mean that after the dissolution of marriage, the divorced girl/women would not be allowed to remarry (usually) in his ex-husband’s (extended) family or clan or tribe.

It is worth your attention that we could not foresee, at the outset of this research project, that an overwhelming majority of our respondents would be supportive of the idea of women’s right to inheritance and education. It goes without saying that to accept women’s right to inheritance and education, their reference point was Islam. We made it sure to ask the FGDs’ participants about a gendered-dilemma, occasioned by the merger – a situation wherein Pakhtunwali dictates a male-individual to kill a female member of his family who is accused of adultery or fornication, while the new laws, extended to the merged districts, treats honor-killing as a cognizable and non-compoundable offence punishable with death. The response that we received was ambivalent on average. On the one hand, they recognized the validity of certain tribal values and practices as both Islamic and Pakhtun, which are intended to regulate sexual relations and maintain family structures – the most fundamental and most reliable source of security to an individual’s life, property, and dignity in the semi-anarchic, Pakhtun tribal belt of Pakistan. On the other hand, they also acknowledged the fact that the state of Pakistan had the capacity to raise the cost for an individual to discourage them continue anti-women practices. In short, the sense that we make of their response is that they made it contingent upon the will and strength of the state to protect women’s rights in the NMDs.

The Skeptics

The skeptics, for the purpose of this study, are those who opposed the merger, because they questioned not only the utility of the new institutions, but the intentions of the state and the legitimacy of the merger. They would argue that the new institutions are unfit in the Pakhtun tribal belt. They questioned the legitimacy of the merger on the grounds that the local population the ex-FATA were not consulted. This camp, about 15 percent of the total respondents, represented the *Maliks* (officially-designated tribal elders in the ex-FATA), the uneducated (or less tribal patriarchs), two senior bureaucrats, and two political parties, one representing Pakhtun nationalism, and the other, political Islam – both representing an orthodox version of what they profess – i.e., the PMAP and the JUI.

The traditional Maliks opposed the merger because they believed that the new system of *th’hanakach’aray* (police and courts) was incompatible with the culture and social reality of Pakhtuns of the ex-FATA. They argued that the state’s interference in, and policing of, their routine lives resulted in the loss

of their “freedoms”²⁰. In addition, they were very critical of Pakistani judicial system for being inefficient and unjust. They believed that the introduction of *patwari*²¹ system, along with an inept judiciary and corrupt bureaucracy would result in both intra- and inter-family conflicts. In short, they believed that the pre-merger tribal ways of managing the society (and market) was more efficient and just – and beyond all, easier to understand, interpret and execute.²²

Two senior bureaucrats who had either served (or serving) in the NMDs were of the opinion that the merger was a little too early and not properly chalked out (and executed).

Almost similar views were held by those whom we call the tribal patriarchs. However, their argument was more cultural than utilitarian: they held chauvinistic views, and felt nostalgic, about their traditional/tribal practices.

Those who opposed the merger of the former FATA on the pretext of the intentions of the state and the legitimacy of the act included reactionary Pakhtun nationalists and tribalists, and the orthodox Islamists, the JUI. The former, i.e., reactionary²³ Pakhtun nationalists and tribalists, believed that the tribal belt of Pakhtuns was a semi-autonomous people – *Azad Qabail* (autonomous tribes) – a status which had been historically respected by both the Raj and Pakistan. Accordingly, the act of Pakistani state to unilaterally abolish the special status of the former FATA was illegitimate. They believed that the state should have held referendum in these areas concerning their future constitutional status. The Islamists, echoing the JUI, held almost similar views. They, believed, that disturbing the special status of FATA would result in instability and adverse relations with Afghanistan – which also laid claim to these areas.²⁴

What we can infer from what has been said so far is that Pakhtuns of the tribal belt of Pakistan had been kept frozen-in-time, first by the colonial state of Great Britain, and then by Pakistan, by officially recognizing and sanctioning the tribal order in these areas, while suppressing the indigenous liberal and progressive voices, such as the Khudai Khidmatgar (later, the ANP) and Khyber Union, a local political organization that had been raising its voice against the FCR since early 1990s in Khyber Agency (now,

²⁰ It must be noted that Pakhtunwali, as a collectivist outlook, discourages individualism. By freedoms, they meant the freedoms of (a tribal) society to manage itself as a collective – unencumbered by the state.

²¹ *Patwari* is a lower-rank revenue official.

²² It is worth mentioning that it is highly probable that a Malik’s stance concerning the merger is mediated by such factors as his party-affiliation. For instance, four Maliks participated in this study, who were staunch supporters of the merger and abolition of the special status of the ex-FATA. All of them were sympathizers of the ANP. All were educated. Three among them were in their early 40s and one was in his 70s. Nevertheless, the Maliks who did not fall in the category of being an active participant of some liberal or progressive movement, tended to be skeptic about the new system.

²³ For the purpose of this study, the term ‘reactionary’ refers to the commonplace meanings it has assumed in social sciences tradition.

²⁴ It is worth noting that the Tehrik-e-Taliban Pakistan (TTP) – the Pakistani version of the Taliban movement – has also denounced the merger of the former FATA into the mainstream constitutional framework of Pakistan as illegitimate, and therefore, they demand that the act be revoked.

district Khyber). We argue that the establishment of modern, rational institutions in the tribal Pakhtun belt of Pakistan was long due. We also conclude that socio-cultural, political and economic mainstreaming of the ex-FATA (now NMDs) is a cumbersome and complex process, which takes time. We, however, make the following recommendations in order to reduce the trust deficit and disillusionment among the local population with regard to the intentions of state and the new institutional order it has instituted in the NMDs; and, hence, to expedite the process of consolidation of the new institutional order in these areas.

Recommendations

Drawing on a post-modern, intersectional analytical model, we do not make a single-axis or monocausal argument, while making policy recommendations in the light of this study. We believe that various social phenomenon and realities, such as science, politics, discourses, culture, market and state, intersect and overlap with each other to make a very complex web of causation, whereby single-axis and linear explanations are often misleading – if not completely unfounded. In order to actuate a social change, from a traditional to rational order of governance, in the newly-merged districts, we recommend the following policy-measures, which cover some, if not most, of the policy areas, such as human rights, gender equality, governance and services delivery, and market:

Human Rights

Human rights deficit, like corruption and inefficiency, is a universal issue in Pakistan. Nevertheless, human rights violations and corrupt practices go with more impunity in the NMDs: because of the scarcity of democratic civil society; weak administrative machinery, with limited resources; lack of viable mechanisms of political accountability, such as strong local governments; security situation; and tribal, patriarchal social order. However, this should not constitute a pretext for human rights violations that go unaccounted for, either at the hands of public officials or private persons. The state has to assert itself by upholding its human rights and gender equality regimes – wherever and whenever it can. Pakistan cannot afford violation of basic human rights anymore, especially at the hands of public officials, because of the ever-growing trust deficit between the state and the local population of the NMDs, resulting from the state's intentional negligence and protracted religious militancy and counter-militancy operations. In past, the cost of governance was higher; in the near future, the cost of (deliberate) non-governance will be unbearable. If human rights violations continue to go with impunity, it will push a common person – man, to be more precise – of the NMDs into the folds of the already-strong extremist forces – both religious and ethno-nationalist – a situation that would be too costly for Pakistan as a state, given the already precarious security situation in the Pak-Afghan region.

Gender Equality

Achieving gender equality would be more challenging, given the patriarchal nature of society in the NMDs. A common *man* is sensitive about (and feels emotionally attached to) their tribal, anti-women culture and practices. Formal/legal policy measures would not suffice. The pro-women laws of Pakistan, such as Women Protection Act (2006), need to be supported by gender-equality discourses, generated and propagated through various discursive spaces and platforms, such as media, mosque, hujras (community centers) colleges and universities. The state should, *at least*, protect feminist voices in these areas from being harassed by either public or private actors, so that they freely participate in the civil society to generate a pro-women discourse in the NMDs. Hence, we need to employ both negative/juridical and positive/discursive powers so as to gradually transform the structures of incentives in favor of gender equality and women empowerment.

Strong Local Governments

The absence of strong governance structures, which could ensure popular accountability of public policy, is not unique to the NMDs either. This is, again, a serious governance issue in the rest of the country as well, which is for one reason or another neglected, although very much highlighted by several studies on Pakistan's public policy and administration. In order to ensure efficiency and accountability, the provincial government of Khyber Pakhtunkhwa needs to empower local governments by delegating to it local administration and services. It also needs to make sure that the district governments get sufficient financial support from the provincial exchequer to enable them to finance local administration and local services and development projects. Local governments will prove instrumental in strengthening democratic civil society and in engaging the local youth in civic affairs.

Strong Civil Society

To say the obvious, the presence of a strong civil society is one of the necessary conditions (as well as one of the signifiers) of human freedoms and democratic governance. So far, both the British Raj and the Pakistani state had been strategic allies of the conservative/religious civil society, particularly in the Pakhtun tribal belt. Now, we believe that the religious right has turned into a Frankenstein monster – threatening the existence of its own creator. If the state elite of Pakistan want to end extremism and actuate the desired social transformation, it needs to stop patronizing conservative social forces. Nevertheless, we do not recommend the state to patronize democratic civil society at the cost of the conservative civil society either. Rather, the state needs to at least stop playing as a player/party in the civil society arena– an arena of discursive struggles and political contestations.

Land Settlement and (Digital) Registration

Almost 50 percent of the land in the NMDs is not settled. The provincial government of Khyber Pakhtunkhwa has embarked upon land settlement and registration process. The process needs to be expedited and properly executed. Land disputes between various clans and tribes need to be solved through local mechanisms of dispute resolution, such as mediation and arbitration, wherein the state should play only the role of a facilitator and guarantor – so that the terms of the settlement are honored.

It goes without saying that land settlement and registration will ultimately result in: resolving land disputes between families, clans and tribes; more efficient utilization of resources; bringing in formal economy; securing women's right to inheritance – which will in turn contribute to gender equality.

Peaceful Mechanisms of Dispute Resolution

The introduction of the new institutional order has rendered the traditional mechanisms of dispute resolution almost dysfunctional. Nor is Pakistani judicial system capable enough to deal with local disputes – especially disputes of civil nature, such as land disputes. Keeping in view this institutional dilemma, the Khyber Pakhtunkhwa provincial government has recently passed an act, Alternative Dispute Resolution (ADR) Act, 2017, in order to help the inhabitants of the NMDs resolve their disputes peacefully and within the constitutional framework of Pakistan, which we believe is a better alternative of resolving local disputes. Nonetheless, the government needs to educate and train the local civil society elite about the ADR before it is implemented. This will help in generating awareness and in building confidence among the local people to resort to the ADR committees to resolve their disputes.

Business and Market

Market in the NMDs is primarily informal, untaxed, and insecure, which translates into black economy, corruption, capital flight, uneven distribution of wealth, and local disputes. Besides land settlement and digitization, we further recommend that the government should also formalize and (democratically) regulate other sectors of the market in the NMDs so as to help its economy grow and get integrated with national and regional economies. We also believe that over-bureaucratization of market hampers doing business. The local economic elite are mostly less educated (if not uneducated altogether) who do not understand the cumbersome bureaucratic processes of business registration and regulations. We recommend that the government should introduce various means of making business easier in the NMDs, such as digitization and one-window operation.

Public Awareness about the Merger

Finally, majority of the local population lacks proper understanding of the nature of the new institutional order, which is in clash with their traditional norms and practices. We recommend that both state and non-

state actors help in educating the local civil society elite, at least, about how the new legal order is designed to regulate their behavior and how it protects their lives, property, and liberty – both in their individual and collective capacities.

Conclusion

In yesteryears, it used to be a cost-effective policy of control to deliberately leave certain spaces ungoverned; but it is no more so today. Studies show that ungoverned spaces provide a fertile soil for extremism and terrorism, smuggling and drug -trafficking (see for instance, Clunan and Trinkunas, 2010). Pakistan's decision to bring the ex -FATA (now, NMDs) into its constitutional fold is a significant step in the right direction – i.e., to bring an end to the officially sanctioned tribalism and, thus, to help these areas get mainstreamed. If it gets consolidated, the new institutional order will be instrumental in securing human rights and gender equality, regionally -integrated, formal market, and social trust and stability. However, transition from a traditional to a rational institutional order in the NMDs is quite tedious and cumbersome, given the ongoing wave of terror, the unprecedented trust-deficit between the state and local population, and the extant tribal norms and religious orthodoxy . In the face of all this, we believe that the state needs to take certain policy measures that can help in restoring trust among the local people and help the newly-instituted order get roots in the NMDs. These include, but are not limited to, upholding fundamental human rights and gender equality, strengthening local governments, creation of space for civil society, land settlement and market formalization, and addressing bureaucratic bottlenecks. Above and beyond, we believe these, and similar, reforms/policies will not be easier to execute in the face of the second wave of terror in the region, following the rise of the Taliban regime in Afghanistan. The Pakistani state elite needs to take into confidence the civil society and political elite of Pakhtunkhwa concerning its Afghan policy and its war against terror, fought mainly in the NMDs and adjoining Pakhtun districts of Pakistan.

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Annexure 1



Source: Map of KPK province and FATA, Pakistan. Note. KPK = Khyber Pakhtunkhwa; FATA = Federally Administered Tribal Areas.



In a society which prefers beliefs over facts and dogmas over ideas, ‘climate of opinion’ remains murky. Theories presented remain devoid of historical context and “wish lists” are presented in the name of policy recommendations. In this situation, the battle of ideas can only be won by clear arguments, effective communication and strategic outreach. The importance of evidence based on empirically grounded knowledge takes a whole new level of importance. This battle of ideas is usually fought through think tanks - institutionalized forms of research and communication - which aim at influencing the climate of opinion in the long run for the benefit of society at large. National Influencers is a think tank that endeavors this goal. It is a non-partisan independent entity in Khyber Pakhtunkhwa - the intellectual capital of Pakistan.

National Influencers aims to become a primary pillar of the political and intellectual movement in Pakistan to play its role in overcoming the entrenched difficulties and increasing the demand for policies in the direction of structural reforms, free enterprise, and individual freedom.

National Influencers has conducted this research to analyze the process of the state-sponsored institutional transition in the newly-merged districts of Khyber Pakhtunkhwa – from a traditional, tribal order to a rational, relatively liberal state-order. In the light of our research findings, we propose that, besides forcefully asserting its sovereign rights to govern the newly-merged districts, the state needs to introduce several policy reforms in order to encourage democratic accountability, formalization and digitization of market, and strong civil society and professional organizations. We emphasize that these (and similar) policy measures will prove instrumental in (re)building (and maintaining) trust between the state and society; in transforming the structures of incentives in favor of the newly-instituted state-order; and, in inspiring the indigenous society and market get integrated with the rest of the country and beyond.

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